



HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

ST. PAUL 55155

October 17, 1983

ADDRESS REPLY TO
ATTORNEY GENERAL'S OFFICE
POLLUTION CONTROL DIVISION
1935 WEST COUNTY ROAD B-2
ROSEVILLE, MN 55113
TELEPHONE (612) 296-7342



•Becky Comstock
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402

Re: U.S. v. Reilly Tar & Chemical Corp.
File No. Civ. 4-80-469

Dear Becky:

Enclosed herewith and served upon you by U.S. Mail is Response of State of Minnesota to Reilly Tar & Chemical Corporation's Request for Production of Documents Dated September 14, 1983.

Very truly yours,

STEPHEN SHASKAN
Special Assistant
Attorney General

SS:mah

cc: All counsel of record

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its
Attorney General Hubert H. Humphrey, III,
its Department of Health, and its
Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION;
HOUSING AND REDEVELOPMENT AUTHORITY
OF ST. LOUIS PARK; OAK PARK VILLAGE
ASSOCIATES; RUSTIC OAKS CONDOMINIUM
INC.; and PHILIP'S INVESTMENT CO.,

Defendants.

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

RESPONSE OF STATE OF
MINNESOTA TO REILLY TAR
& CHEMICAL CORPORATION'S
REQUEST FOR PRODUCTION
OF DOCUMENTS DATED
SEPTEMBER 14, 1983

TO: EDWARD J. SCHWARTZBAUER, BECKY A. COMSTOCK, MICHAEL J. WAHOSKE, JAMES E. DORSEY, III, DORSEY & WHITNEY, 2200 FIRST BANK PLACE EAST, MINNEAPOLIS, MINNESOTA 55402, ATTORNEYS FOR REILLY TAR & CHEMICAL CORPORATION.

Plaintiff-intervenor State of Minnesota makes the following responses and objections to Reilly Tar & Chemical Corporation's Request for Production of Documents, dated September 14, 1983.

General Responses and Objections

A. The State will produce all raw data which are responsive to these requests and which were observed, gathered or determined through chemical analyses by its employees or by its consultants who are not State employees (hereinafter "non-State consultants").

B. The State will produce all documents presented to the public at public meetings held in St. Louis Park on February 15, 1983, and May 16, 1983, concerning the soil and ground water contamination problem emanating from the former Reilly Tar plant site in St. Louis Park. The State will also produce all notes utilized in their presentations at these meetings by its employees and non-State consultants.

C. In regard to the project to evaluate ground water treatment alternatives being undertaken for the State by the firms of CH₂M Hill and Barr Engineering, the State agreed at the

August 24, 1982, settlement meeting to permit Reilly through its consultant ERT to participate in the progress report and planning sessions (i.e., "milestone meetings") in that project. See Attachment A hereto, a letter of September 15, 1982, from State's counsel Stephen Shakman to Reilly's counsel Edward J.

Schwartzbauer. The State has provided ERT the intermediate reports from this project, except for two recent reports which will be produced. The State asserts that these disclosures to Reilly are subject to the protections for settlement discussions provided by Rule 408, F.R.E. and common law, and do not constitute a waiver of privileges and protections as to other documents regarding the CH₂M Hill-Barr project which were not disclosed to Reilly.

D. The State and United States have previously produced to Reilly in regard to the St. Louis Park polynuclear aromatic hydrocarbon ("PAH") problem the "Phase I" (1976) and "Phase II" (1977) Barr Engineering reports, the Hickok report (1981), the U.S. Geological Survey ("USGS") preliminary report (1979), all raw data in the USGS St. Paul district office, and the CH₂M Hill-Barr Engineering intermediate reports described in General Response C above. The other non-State consultants listed on pages 3-4 of Reilly's Request have not worked for the State or for its consultants on the St. Louis Park PAH problem.

E. Except as otherwise noted in General Responses A-D above, and in Specific Responses 1 and 3 below, the State objects to production of the documents of the non-State consultants, including communications between them and State employees, on grounds of attorney work product, trial preparation materials within the protection of Rule 26(b)(3-4), Fed. R. Civ. P., and deliberative process privilege.

F. The State objects to each and every request on grounds of vagueness, overbreadth, and burdensomeness to the extent those requests incorporate Reilly's definition of a "consultant" as "all private consulting persons and all U.S. and State agencies, departments, divisions and employees thereof, employed, retained or utilized by the U.S. or the State, . . . whose work assisted in any publication or presentation to the public." (Emphasis added.) The State will construe the underlined clause of the above quotation as limited to the fourteen state and federal agencies and non-State consultants listed in Reilly's definition of a "consultant." The State has not employed any non-State consultant for public relations purposes concerning the public meetings of February 15, and May 16, 1983.

G. The State objects to production of documents previously produced to Reilly Tar, its attorneys or its consultants.

Without waiving any of its general objections, the State responds and objects to each item of the Request as follows:

Specific Responses and Objections

1. All contracts and/or letters of intent, agreement or understanding between the U.S. and its consultants and between the State and its consultants.

Response: The State will produce all such documents between it and its non-State consultants. The State objects to production of employment contracts with its own employees as burdensome and irrelevant. Documents between the United States and its consultants are more readily obtainable from the United States and will not be produced by the State.

2. All correspondence between the U.S. and its consultants and between the State and its consultants.

Response: See General Responses and Objections.

3. All bills, invoices or statements submitted to the U.S. by its consultants and submitted to the State by its consultants.

Response: The State will produce all such documents between it and its non-State consultants. Such documents between the United States and its consultants are more readily obtainable from the United States and will not be produced by the State.

4. All documents which relate to meetings or communications between the U.S. and its consultants and the State and its consultants.

Response: See General Responses and Objections.

5. All documents which refer or relate to any instructions or guidelines given to consultants by the U.S. and the State in preparing any report, memorandum or other document reflecting or constituting work performed, in whole or in part, by such consultants to the U.S. and the State. Without limitation, this request includes all documents which refer or relate to instructions or guidelines given to consultants by the U.S. and the State in developing drinking water criteria or standards for polynuclear aromatic hydrocarbons.

Response: Most instructions or guidelines from the State to its non-State consultants are found in documents in the public domain (i.e., Requests for Qualifications and Requests for Proposals). Such public documents which have not already been provided to Reilly will be produced. Documents summarizing the Minnesota Department of Health's PAH criteria for drinking water in St. Louis Park and surrounding communities have been provided to Reilly. Other internal Department of Health and Pollution Control Agency documents concerning drinking water criteria for

PAH, not otherwise privileged, will be produced. Communication to and from consultants, not intended to be made public, will not be produced. See General Response E above.

Responsive documents between the United States and its consultants are more readily obtainable from the United States and will not be produced by the State.

6. All drafts of reports, memoranda or other documents, in whole or in part, reflecting or constituting work performed by consultants to the U.S. and the State.

Response: Drafts prepared for the State by its non-State consultants, except as otherwise noted in General Responses B, C and D above, are deemed privileged and will not be produced. Drafts prepared for the United States are more readily obtainable from the United States and will not be produced by the State.

7. All documents not in the public domain consulted, referred to or relied upon by consultants to the U.S. and the State in the course of preparing any report, memorandum or other document reflecting or constituting work performed, in whole or in part, by such consultants to the U.S. and the State.

Response: "Documents not in the public domain" could include documents prepared by non-State consultants as part of their work on this problem, communications to the consultants from the

State, and documents prepared by persons not involved in this litigation ("outside information"). The first two categories are covered by Requests 2, 4, 5, 6, 8, 9, 10 and 13. The State reasserts here its responses and objections to those requests. The State will produce the "outside information" provided it is not unduly burdensome to do so.

Documents not in the public domain which were utilized by consultants to the United States are more readily obtainable from the United States and will not be produced by the State.

8. All documents created by consultants to the U.S. and the State in the course of or in connection with the preparation of any report, memorandum or other documents reflecting or constituting work performed, in whole or in part, by such consultants to the U.S. and the State, including but not limited to, notes, memoranda, correspondence or other documents:

- (a) commenting upon the report, memorandum or other document; or,
- (b) commenting upon or containing any information included or considered for inclusion in the report, memorandum or other document; or,
- (c) commenting upon or containing any recommendation or conclusion adopted or rejected by the report, memorandum or other document.

Response: The State will not produce such documents created by its non-State consultants. See General Response E above.

Such documents created by consultants to the United States are more readily obtainable from the United States and will not be produced by the State.

9. All documents which refer or relate to any possible remedial actions for the polynuclear aromatic hydrocarbon problem in St. Louis Park, which were considered, evaluated or discussed in any report, memorandum or other document prepared by consultants to the U.S. and the State, including without limitation, all documents which refer or relate to the process by which the consultants and the U.S. and the State evaluated the possible remedial actions to the polynuclear aromatic hydrocarbon problem in St. Louis Park.

Response: Except as otherwise qualified in the General Responses, the State will not produce such documents created by its non-State consultants, nor communications thereon from State employees to those consultants. See General Response E above. Such documents created by consultants to the United States are more readily obtainable from the United States and will not be produced by the State.

10. All documents which refer or relate to drinking water criteria or standards for polynuclear aromatic hydrocarbons which were prepared by or consulted or considered by consultants to the U.S. and the State.

Response: See Response to Request #5. The State will also produce responsive "outside information," as defined in the Response to Request #7.

11. All documents which refer or relate to any monitoring, testing or analysis of the environment in the Twin Cities metropolitan area by consultants to the U.S. and the State.

Response: As set forth in General Response A above, the State will produce all raw data from its employees or its non-State consultants regarding the St. Louis Park PAH problem. Such data includes data collected as part of these projects from outside St. Louis Park for purposes of comparison with St. Louis Park data, consideration of disposal of St. Louis Park contaminants, and other purposes directly related to the consultants' St. Louis Park work. To the extent this Request seeks any and all data from the State and its non-State consultants generated anywhere in the Twin Cities area, the State objects to it as vague, overbroad, and burdensome.

The State will not produce documents from consultants to the United States since such documents are more readily obtainable from the United States.

12. All documents which refer or relate to the design, cost, operation, testing or performance of any drinking water or groundwater treatment system.

Response: The State construes this request as limited to drinking water or ground water treatment systems considered for the St. Louis Park PAH problem. As to the documents of the State's non-State consultants, see General Response C above. The State will produce responsive documents generated or collected by employees of its Department of Health or its PCA which are not otherwise privileged.

13. All documents which refer or relate to: (a) any work which consultants to the U.S. and the State performed in connection with or in the course of preparing any report, memorandum or other document; and (b) any work proposed to be undertaken by any consultant to the U.S. and the State in connection with the preparation of any report, memorandum or other document but not actually performed.

Response: See General Responses and Objections, and Response to Request #8.

14. All documents which refer or relate to the publication, release or presentation of any report, memorandum or other document reflecting or constituting work performed by any consultant to the U.S. and the State, to federal, state or municipal officials, the public and the press, including but not limited to, documents which refer or relate to the work of any

public relations person employed, retained or utilized by the U.S., the State or other other consultants, to assist in publication, release or presentation of any such report, memorandum or other document.

Response: As to presentations of non-State consultants' work to federal, state, or municipal officials involved in this lawsuit, the State objects to production on grounds specified in General Response E above. Otherwise, the State will produce responsive documents relating to its non-State consultants and employees. Documents relating to the consultants to the United States are more readily obtainable from the United States and will not be produced.

15. All documents prepared on behalf of the U.S. and the State by their consultants or which refer to or relate to any report, memorandum or other document reflecting or constituting work performed by any consultant on behalf of the U.S. and the State not described in Request Nos. 5-14 above.

Response: See General Responses and Objections.

CONCLUSION

Subject to the foregoing objections, the State will produce those documents requested which are in its custody or control, at a time or times and at a place or places which may be agreed upon


by counsel, and under circumstances which do not unduly disrupt normal business operations.

Dated: October 17, 1983.

HUBERT H. HUMPHREY
Attorney General

Paul Zerby
Minnesota Department of Health
136 University Park Plaza Building
2829 University Avenue S.E.
Minneapolis, MN 55414

Dennis M. Coyne
Lisa R. Tiegel


BY: Stephen Shakman
Special Assistant
Attorneys General

Minnesota Pollution Control Agency
1935 W. County Road B-2
Roseville, MN 55113

(612) 296-7342

Attorneys for Plaintiff-Intervenor
State of Minnesota



STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

ADDRESS REPLY TO
OFFICE OF THE ATTORNEY GENERAL
MINNESOTA POLLUTION CONTROL AGENCY
1055 W COUNTY ROAD 52
ROSEVILLE, MINNESOTA 55113
(612) 296-7342

September 15, 1982

Edward J. Schwartzbauer
Dorsey & Whitney
2200 First National Bank Bldg.
Minneapolis, MN 55402

Re: United States v. Reilly Tar & Chemical Corporation, et al.
Civ. File No. 4-80-469

Dear Ed:

This letter is written as a follow-up to our meeting of August 24, 1982, at the Office of the United States Attorney.

Many areas of common agreement were discussed between the Reilly Tar representatives and the State and federal representatives. In general, there appears to be agreement that the highest priorities include assurance of potable water supplies to the City of St. Louis Park and continued groundwater monitoring. The State explained its drinking water criteria of 28 nanograms per liter for the sum of carcinogenic PAH compounds and 280 nanograms per liter for the sum of noncarcinogenic PAH. Other priorities reviewed include the control or elimination of source material and the control of pathways for contaminant movement. Everyone agreed that explanation of the elements of a comprehensive solution to the public, and response to public input, are not only required under the Superfund Act but essential to successful resolution of the problem.

The water treatment study supported by federal funding is now underway. As we discussed, the State has agreed to ERT's attendance at milestone meetings of the review panel established for that study. We expect to hear from you shortly on Reilly Tar's intentions for further participation in water treatment, including payment of the study and/or the conduct of parallel studies.

There appears to be general agreement that monitoring groundwater and understanding the dynamics of pollutant transport

ATTACHMENT A

AN EQUAL OPPORTUNITY EMPLOYER



Edward J. Schwartzbauer
September 15, 1982
Page Two

are also high priorities. Many of the parameters have been established and some of the modeling work has been accomplished. ERT advised that its expertise in these areas was not comparable to its expertise in water treatment and that it would need to evaluate whether it could make a technical contribution in these areas.

ERT advised that source control and control of pathways for contaminant movement are closely linked and need to be considered together. You suggested that ERT submit a proposal to treat the source material south of Highway 7. We note that you made the same suggestion in your letter of July 28 to Erica Dolgin. Addressing source material south of Highway 7, and at other locations on or near the site, is important to the State and has been included in the recently approved proposal for Superfund work.

The governmental representatives emphasized that a comprehensive solution or "whole package" needs to be developed and that the cooperative agreement currently under final review by EPA outlines the path to such a solution. Contracting for the near-term work (source material study, well abandonment and hydraulic stress testing), to be funded with the \$1.9 million Superfund grant, will begin with publication of Requests for Credentials (RFC) in early November. From the August 24 meeting, we inferred that Reilly Tar will likely submit a comprehensive solution in advance of the RFC's (i.e. by November 1). Would you confirm Reilly Tar's present intentions on submitting such a proposal.

With regard to the continuing cooperation of State personnel with ERT in the investigation and sampling of the Reilly Deep Well (Well No. 23), our understanding is that you have authorized ERT to dialogue openly with the MPCA staff and to incur on Reilly Tar's behalf certain additional expenses pertaining to the well investigation. The first billing on these expenses is expected in a few days and will be forwarded to you for payment.

The meeting on August 24 made significant progress toward a mutual understanding of the respective priorities of the parties. We now need your advice as to Reilly Tar's participation in the

Edward J. Schwartzbauer
September 15, 1982
Page Three

water treatment work and plans for proposing a comprehensive solution.

Very truly yours,



STEPHEN SHAKMAN
Special Assistant
Attorney General

SS/ps

cc: Erica L. Dolgin
Robert E. Leininger
Paul Bitter
David Giese
Michael Hansel
Dennis M. Coyne

P.S. Would you ask ERT to provide Mike Hansel the details on the TOC analysis of groundwater and on the PAH analysis of pristine peat bog water, as discussed at the August 24 meeting. Thank you.